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ABSTRACT

This paper asserts that school counselors and other professional counselors need to be aware of lawsuits involving professional rights and responsibilities. It notes that the courts have heard cases involving privileged communication, failure to exercise adequate precautions for a suicidal client, sexual misconduct, invasion of privacy, and defamation. A review of court cases related to these topics is presented which describes alleged charges and outcomes of the cases to help counselors become aware of how the courts have interpreted the rights and responsibilities of professional counselors. Cases are cited in the areas of: (1) confidentiality; (2) sexual misconduct; (3) invasion of privacy; and (4) defamation. It is recommended that professional counselors be aware of such cases and their outcomes, carry liability insurance, be familiar with the professional code of ethics that applies to all counselors, and contact appropriate personnel who can explain the implications of any counseling concerns. (NB)

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SELECTED LITIGATED COURT CASES INVOLVING COUNSELING PROFESSIONALS

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ABSTRACT

Professional counselors have been faced with lawsuits which delimit professional rights and responsibilities. This article reviews the alleged charges and outcome of litigation involving school and other mental health counselors. The purpose of this review is to assist practitioners to become more familiar with how the courts have interpreted the role of the professional counselor.

SELECTED LITIGATED COURT CASES INVOLVING COUNSELING PROFESSIONALS

School counselors and other mental health counselors need to become aware of lawsuits which have involved professional rights and responsibilities. The courts have acted upon issues which include: privileged communication; failure to exercise adequate precautions for a suicidal client; sexual misconduct; invasion of privacy; defamation, and others (Brown, Pryzwansky, & Schulte, 1987; Barton & Barton, 1984; Fisher & Sorenson, 1985; Hopkins & Anderson, 1985; Slimak & Berkowitz, 1983). The purpose of this article is to review some court cases related to these topical areas, describe the alleged charges, and outcome of the case, so that counselors may become aware of how the courts have interpreted rights and responsibilities of professional counselors.

Confidentiality and the Counselor

The legal expression for confidentiality between a client and counselor is "privileged communication." Clients need to trust their therapist and believe that information discussed during therapy will remain confidential. Without this assurance, many clients may avoid seeking assistance to their problems (Hopkins & Anderson, 1985).

However, confidentiality between a client and counselor must not be thought of as absolute. In Tarasoff v. the State of California (CA., 1976), the CA. Supreme Court wrote:

"Public policy favoring protection of the confidential character of patient-psychotherapist relationship must yield in instances in which disclosure is essential to avert danger to others; the protective privilege ends where the public peril begins (at 561).

..."therapist owes a legal duty not only to his patient, but also to his patient's would-be victim and is subject in both respects to scrutiny by judge and jury." (at 345-6).

To illustrate how far the courts have gone to protect individuals, and/or their property, v. honor privileged communication between a counselor (or therapist), and a client, four cases will be presented:

The case of Tatiana Tarasoff who was killed by Posenjit Poddar has been cited extensively in counseling literature and referred to in various state litigation proceedings. Poddar was a client who was receiving counseling services at the University of CA Hospital at Berkeley. During therapy, Poddar confided to his counselor his intent to kill Tarasoff when she returned from a trip to Brazil. The therapist discussed the alleged threat with his supervisor. Subsequently the university police were alerted. They brought Poddar in for questioning to further explore the seriousness of the threat. Under questioning, Poddar said he was not serious about the threat. He was subsequently released from the authorities. However, when Tarasoff returned from her trip, Poddar murdered her.

The parents of Ms. Tarasoff sued the university system and the therapist, charging that neither they, nor their daughter were cognizant of the imminent danger. The lower court concluded no negligence existed on the part of the therapist or the university system. However, upon appeal, the higher court reversed the lower court's decision and charged the defendants with "failure to warn", stating that professionals have a responsibility to avert foreseeable danger to another person. The defendants were therefore charged with negligence (Tarasoff v. Regents of the University of Calif., 551, P.2d, 334, Cal. Sup. Ct., 1976).

In citing Tarasoff, the Supreme Court of Vermont reversed a lower court's decision and found a mental health outpatient center had a responsibility to warn a family of an alleged threat by a client to burn down his parent's barn. The court found that failure of the counseling center to warn the parents of harm to their property constituted negligence and breach of duty owed to the parents by the agency (Peck v. Counseling Service of Addison County, Inc. No. 83-062, VT. Sup. Ct., June 14, 1985).

"Duty to warn" was not established in a Wisconsin case which involved a student who had received counseling services at Stout State College:

Jane Dunn was a student at Stout State College and a client at the school's counseling center. Counseling services were provided to Jane for approximately six months. When the

counselor believed further counseling would not result in additional progress, the client/counselor relationship was amicably terminated. Six months later Jane committed suicide.

The parents of Jane Dunn sued the counselor for negligence, alleging the counselor failed to secure emergency psychiatric services for Jane, and failed to warn the parents of impending danger. The court ruled in favor of the counselor, finding there was no clear causal connection between events, and that as counselors do not have medical training, any attempt at a medical diagnosis would be outside the realm of counselor expertise. However, as a professional, a standard of care, over and above the care provided by an ordinary citizen, will be typically expected by the courts. Therefore, if Jane Dunn showed undue anxiety upon termination of the client/counselor relationship, the court may have ruled in favor of the plaintiffs (Bogust v. Iverson, 102 N.W.2d 228, Sup. Ct. of Wis. 1960).

When the director of a rape counseling center refused to allow defendant's lawyers to inspect portions of the center's files of a rape-victim's statements for inconsistencies in the victim's testimony, the issue of privileged communication was again challenged. The counseling center's director maintained that files were protected from outside scrutiny, under the auspices that privileged communication exists between a client and his/her therapist.

The director's refusal to open the counseling center's

records was perceived by the lower court as contempt and ordered the director to make available case notes. The director of the counseling center appealed to the Supreme Court of PA. for a decision. The higher court overturned the lower court's decision, concluding confidentiality to be a vital and essential component of counseling services provided at the center, stating that confidentiality must be guaranteed to clients who utilize the services of a crisis counseling center, for if confidentiality could not be guaranteed by the center, other persons may not seek needed services. This case serves to support the necessity of privileged communication between a client and a counselor (Pittsburgh Action Against Rape, 494 PA. 15, 428 A. 2d 126, 1981).

These selected litigated cases were chosen to provide counselors with examples of how the judicial system recognizes the extent of privileged communication between client and counselor. This privilege will not be recognized if a client presents a serious threat of impending danger or violence to another person or property. In this instance, privileged communication is overridden by an obligation, as a citizen, to use "reasonable care" to protect intended victims and/or property against danger.

Sexual Misconduct

Professional ethics view sexual activity between parties as harmful to the party who is a recipient of professional services,

and deviant from accepted standards of treatment. Moreover, if a therapist is found guilty of sexual misconduct, the credentials and privilege to continue to work as a professional, will be revoked by the credentialing board (Barton & Barton, 1984). A case which illustrates the court's attitudes regarding the issue of sexual misconduct involves a psychiatrist, Dr. Hartogs.

Dr. Hartogs warned a client, a 31-year old divorced woman, that dysfunctional and troublesome symptoms would reappear if she did not continue to participate in sexual activities with him. Other clients testified Dr. Hartogs had also requested sexual favors. As a result of the allegations being confirmed, the judge found Dr. Hartogs guilty of malpractice, and of abusing his position to coerce his client. His credentials were revoked, and he was disqualified from being recognized as a licensed physician. Although this case involved a psychiatrist, the taboo for intimacy is a generalizable concept for other professional advisor/advisee relationships, e.g., attorney/client, teacher/student, client/counselor. As a conscientious professional, be aware of conflict of interests, and your professional obligation not to take advantage of the powerful and influential position you have over another invidivual (Roy v. Hartogs, 366 NYS 2d. 297, 381, 1976).

Invasion of Privacy

The First Amendment guarantees freedom of speech and expression. The Fourteenth Amendment guarantees personal

liberties and restrictions from any state action. The Fourth Amendment protects individuals from unreasonable search and seizure (Alexander, 1980). The issue of invasion of privacy v. speech and/or actions which must be contained for the benefit of others who share a particular environment; as well as rights of parents v. rights of minors, v. rights of schools and agencies, have been determined by the courts through interpretation of constitutional law.

The extent of privileges guaranteed or denied under the Fourth Amendment was challenged in 1975, in a Columbus, Ohio, Public School System case. In Goss v. Lopez, school officials were found to have the power to search for weapons and/or drugs as there was reasonable suspicion to believe that contraband, which violated school rules, existed (Goss v. Lopez, 419 U.S. 565, 95, S. Ct.729, 1975).

In Bilbrey v. Brown (1985), the courts cited Goss v. Lopez and determined counselors, as well as other school officials, act as instrumentalities of the state, and may, if there is reasonable cause, search a student for contraband. The search must be deemed by the courts as reasonable, or immunity from charges will be waived and a school (or agency) may be found guilty of invasion of privacy. School (and agency) counselors should become familiar with the term "in loco parentis" which permits officials to maintain order by exercising necessary authority over pupils in the schools (Alexander, 1980; Bilbrey v.

Brown, 738 F.2d 1462, 9th Cir. 1984, New Jersey v. T.L.O.____U.S.S.Ct.____, L.Ed.2d, 1985).

Interpretation of the meaning and privileges which constitute the Fourteenth Amendment was challenged in a Maryland case. Parents sought to declare unconstitutional the local school system's plan to provide a comphrensive program of family life and sex education in every elementary and secondary school, for all students, as an integral part of the curriculum. The parents of the school children involved in this case asserted they should have the exclusive right to teach their children about sexual matters. The court concluded no such constitutional right exists, and, as the schools are in the business of education, they may decide upon necessary curriculum to educate the youth (Cornwell v. State Bd. of Educ. U.S. District Ct., Maryland, 1969).

Similarly, under the Fourteenth Amendment, the court ruled that counselors do not violate parental rights by providing teenage students with information regarding sexual education, and/or informing students that a woman has a right, guaranteed by the Constitution, to secure an abortion:

Akron, Ohio had a city ordinance which prohibited abortion on an unmarried minor under 15 years old, unless permission was granted from one parent or legal guardian. In a split decision (6-3), the Supreme Court ruled the ordinance unconstitutional due to Roe v. Wade, 410, U.S. 113, 153 (1973) which established a

woman may decide whether or not to terminate her pregnancy. Therefore, minors may have a right to secure an abortion as part of their constitutional right to privacy and parents do not have to provide permission to their minor daughter to abort.

The rights of minors is not absolute, but rather is considered a qualified right. In the case of a dispute, the courts may first determine if the minor has the necessary wherewithal and maturity to make an involved decison (Barton & Barton, 1984; City of Akron v. Akron Center for Reproductive Health, Inc. 51 U.S.L.W.4767, 1983).

Defamation

Defamation is any communication that tends to injure or diminish a person's reputation. A third party must be present to confirm the defamation. Slander is oral defamation; libel is written defamation and is more serious as it is a permanent record.

A school counselor informed a social service agency that a student's parents drank too much and that there appeared to be a lot of physical violence in the home. Based on this information, the social service agency recommended the student be placed in a foster home. The parents sued the counselor for defamation. The court found that the counselor acted in good faith, with a legitimate purpose, and was not found liable. If the counselor had acted with malice, in bad faith, the court may have found him liable (Dick v. Watowan County, 551 F. Supp. 983 (D. Minn.

1982).

In Landeros v. Flood (1976), it was established that a physician could be held liable in money damages for failure to report a case of child abuse. Using similar reasoning, the courts could hold that any educator, including counselors, could be held liable for monetary damages for not reporting child abuse.

A counselor does not need to be absolutely certain before filing a report. It is sufficient if a counselor suspects there is "reason to believe" some abuse is happening, and that the counselor acts in "good faith" in reporting suspected incidence. Child abuse is a state, and not a federal crime. Therefore, the definition of child abuse or neglect varies according to state statutes. Counselors should become aware how their state and/or agency views child abuse, and the legal protocol expected.

Conclusion

These cases present some of the details of court cases involving professional counselors. They do not establish a given precedent as each state defines professional responsibilities individually (Barton & Barton, 1984; Hopkins & Anderson, 1985).

Our legal system maintains the defendant is innocent until proven guilty. Therefore, if someone alleges you are guilty of civil or criminal disobedience, keep in mind the burden of proof rests with the plaintiff, the person(s) initiating the lawsuit. Nevertheless, legal counsel must be secured. As legal fees are typically considered fairly expensive, it appears professionally

wise for counselors to carry liability insurance.

The James Group, which the American Association for Counseling & Development (AACD) endorses, increased their premium by almost one-third from 1985-1986 (approximately $307/year for coverage). Personal communication with one of the James Group repesentatives at the AACD Conference in New Orleans (April, 1987), informed the author that there were approximately 300 cases during the past five years. This is not a large amount of litigation for the number of counseling professionals who purchase this insurance. The premium was increased in anticipation that it is expected there will be an increase in the amount of lawsuits against professional counselors.

A reasonable conclusion for counseling professionals is that we must become aware of our legal rights and responsibilities and of court precedents. The courts will expect us to live up so some expected standard of care, over and above what may be expected by ordinary citizens. Findings of previous court cases may be a consideration in determining guilt or innocence in malpractiice or negligence. In addition, the courts may turn to a professional's code of ethics for guidance of ethical behavior (Hopkins & Anderson, 1985).

Therefore, it behooves us as professionals to become become familiar with the code of ethics by which we practice our profession. Barton and Barton (1984, p. 66) identify an adapted Canadian Medical Association's Code of Ethics which could suffice

as an abbreviated appropriate professional code of behavior for all professional counselors:

Consider first the well-being of the client.

Honor the profession and its traditions.

Recognize your limitations and seek necessary consultation.

Preserve the confidentiality of your relationship with all clients and protect their right to privacy.

Teach and be taught. Improve your knowledge and skills.

Be responsible in your setting and place a fair value on your services.

Participate in activities to improve the health of your community.

In conclusion, a counselor or therapist, adhering to a standard of care which appears above reproach will protect you from costly litigation (in both time and money). When in doubt concerning your or your client's stated or implied actions, contact appropriate personnel to explain the implications of any concerns.

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